

Letter of Findings: 04-20120225
Gross Retail Tax
For the Years 2009 and 2010

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ISSUE

I. Taxable Transactions – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b), (c); IC § 6-8.1-5-1(c); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); [45 IAC 2.2-1-1\(a\)](#); [45 IAC 2.2-4-1\(a\)](#); [45 IAC 2.2-4-1\(b\)](#); [45 IAC 2.2-4-2](#).

Taxpayer argues that it was not required to collect sales tax on transactions in which Taxpayer delivered "yellow rock and dirt" to its customers.

STATEMENT OF FACTS

Taxpayer is a local, Indiana contractor. Among other services, Taxpayer installs pre-built "pole buildings." Taxpayer also performs concrete work and installs waterway and other drainage facilities. Taxpayer invoices its customers using "lump sum" and "time and material" contracts. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Taxable Transactions – Gross Retail Tax.

DISCUSSION

According to the Department's audit report, "[T]he [T]axpayer made sales and deliveries of yellow rock and dirt." The report noted that Taxpayer billed customers at what was called a "flat rate" which included a delivery charge. Treating these sales as the transfer of "tangible personal property," the audit assessed sales/use tax "where no tax was collected and no valid exemption certificate was obtained from the customer."

Taxpayer argues that the delivery of "yellow rock and dirt" was not subject to tax. Taxpayer explains that it has an agreement with a local stone quarry by which Taxpayer receives the "yellow rock and dirt" free of charge. However, the unwritten agreement purportedly provides that Taxpayer is not allowed to charge his customers for the "yellow rock and dirt." As explained in Taxpayer's protest letter:

[T]he [T]axpayer is only allowed to charge the customer a hauling fee for the use of his truck and use of his equipment to load and unload the dirt. There is no sales transaction involved for the materials[,] only for the service of hauling rock and stone.

The issue is whether the "yellow rock and dirt" transactions constitute the taxpayer sale of tangible personal property or whether Taxpayer is merely providing its customers an exempt service.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. [45 IAC 2.2-4-1\(a\)](#) provides that, "Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a 'retail merchant.'"

A taxable retail transaction occurs when; (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then transferred to another person for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

However, [45 IAC 2.2-4-2](#) provides that, "[P]rofessional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail," and "are not subject to gross retail tax."

However, the presumption in Indiana is that all retail sales are subject to sales tax unless expressly exempted by statute. IC § 6-2.5-2-1. Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

For purposes of determining the amount of the sales transaction subject to sales tax, [45 IAC 2.2-4-1\(b\)](#) provides:

All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

- (1) The price arrived at between purchaser and seller.
- (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

Taxpayer was able to provide copies of the original invoices, a statement from the quarry owner stating that the "yellow rock and dirt" is "a waste product," and a copy of Taxpayer's rate chart setting out prices for delivery and labor charges. However, the nature of the transactions is plain on the face of Taxpayer's own invoices. Taxpayer acquired rock and sand and delivered rock and sand to its customers. In the ordinary course of Taxpayer's business, Taxpayer acquired tangible personal property and transferred ownership of that property for consideration. In essence, Taxpayer's customers wanted rock and sand; Taxpayer acquired rock and sand; Taxpayer delivered rock and sand and charged – typically – a single unitary price for the rock and sand. As such the price charged is subject to sales tax under [45 IAC 2.2-1-1\(a\)](#) which states:

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price. See also IC § 6-2.5-4-1(a) ("A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he . . . acquires tangible personal property for the purpose of resale . . . and transfers that property to another person for consideration.")

The Department has no reason to doubt Taxpayer's intentions but its determination on this issue is circumscribed by the documentation available, Taxpayer's burden of proving that the assessment is wrong, and any reasonable application of the law.

FINDING

Taxpayer's protest is respectfully denied.

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